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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DELINA FERRETTI et al., Plaintiffs and Appellants, v. DIANE EVERSTINE et al., Defendants and Respondents.	H026613 (Santa Clara County Super. Ct. No. CV804650)

I. INTRODUCTION

This is an appeal from the trial court's order granting a special motion to strike pursuant to Code of Civil Procedure, section 425.16,[1] the so-called anti-SLAPP statute. We conclude that the trial court properly granted the motion and affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case has its origin in a dispute between plaintiff Donna Fryer and her ex-husband, Mark Vidunas, over custody of the couple's two sons. In connection with that dispute, the family law court appointed defendant Diana Everstine, Ph.D., to conduct a custody and visitation evaluation and to make recommendations to the court. Both parents agreed to the appointment. The resulting evaluation was critical of Fryer and apparently prompted the family law court to give Vidunas temporary, unsupervised

[1] Hereafter, all undesignated statutory references are to the Code of Civil Procedure.

visitation--a result that Fryer has consistently opposed. Dr. Everstine's testimony at the custody trial was also very critical of Fryer and, according to Fryer, was the cause of a dependency proceeding in which the two boys were temporarily removed from her custody.

Fryer, individually and in her capacity as guardian ad litem for her sons, along with Fryer's mother, Delina Ferretti and Ferretti's husband, Brad Foster, sued Dr. Everstine, her affiliated entities, Behaviordata, Inc., and Affiliated Psychologists & Counselors, Inc., for injuries they claim to have suffered as a result of Dr. Everstine's custody and visitation evaluation.[2] Plaintiffs' second amended complaint lists eight causes of action: (1) fraud and deceit, (2) breach of fiduciary duty, (3) negligence per se, (4) intentional infliction of emotional distress, (5) negligent infliction of emotional distress, (6) negligence, (7) malicious prosecution, and (8) violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. § 1961 et seq.). The gist of the complaint is that Dr. Everstine's written evaluation, her testimony at trial, and her communication with agents from the county social services agency, were false and misleading. Briefly, the factual allegations are that Dr. Everstine fabricated evidence favorable to Vidunas and ignored evidence unfavorable to him and that her psychological testing of Fryer was faulty, inaccurately portraying her as a possible threat to her children's well being.

Defendants filed a special motion to strike the entire lawsuit under section 425.16, arguing that the action arose from their constitutionally protected activity and that plaintiffs had no probability of success because their causes of action were barred by the litigation privilege of Civil Code section 47, subdivision (b)(1). Plaintiffs opposed the

[2] Defendants Helen Moreno, TLC Kids, and Steve Smith are not respondents here. Our reference to "defendants" is to Dr. Everstine, Behaviordata, and Affiliated Psychologists.

motion on the ground that Dr. Everstine's actions were not constitutionally protected and that the litigation privilege did not apply. The trial court granted the motion, striking the whole of the second amended complaint.

Plaintiffs then discharged their attorney and filed a motion for reconsideration (§ 1008), arguing that they had told their attorney what the law was but he had not listened to them and as a result, he had failed to address the required issues when opposing the anti-SLAPP motion. The trial court denied the motion for reconsideration, concluding that all of the evidence and arguments contained in the motion were included in plaintiffs' opposition to the anti-SLAPP motion or were available to them at that time.

Plaintiffs' notice of appeal is directed to both the trial court's granting of the anti-SLAPP motion and the court's denial of their reconsideration motion.

III. LEGAL FRAMEWORK AND STANDARD OF REVIEW

A special motion to strike under section 425.16 allows a defendant to gain early dismissal of a lawsuit that qualifies as a SLAPP. "SLAPP is an acronym for 'strategic lawsuits against public participation.' " (*Jarrow Formulas*, *Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) A SLAPP suit is one "arising from any act of [a] person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" and is subject to a special motion to strike "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Thus, evaluation of an anti-SLAPP motion requires a two-step process in the trial court. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

A defendant meets the burden of showing that the plaintiff's action arises from a protected activity by showing that the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in section 425.16, subdivision (e). (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.) Those four categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

In the second prong of the evaluation, the plaintiff's burden of demonstrating a probability of prevailing on the merits is subject to a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. (*ComputerXpress*, *Inc*. *v. Jackson* (2001) 93 Cal.App.4th 993, 1010.) The court determines only whether the plaintiff has made a prima facie showing of facts that would support a judgment if proved at trial; it does not weigh plaintiff's evidence. (*Ibid.*) But the plaintiff may not rely solely on allegations in the complaint, even if verified; rather, the plaintiff's showing must be made by competent, admissible evidence. (*Ibid*.)

In the present case, plaintiffs contend that they should have prevailed on both prongs of the test. We review the issues in order, determining, de novo, whether plaintiffs' action is subject to section 425.16 and if so, whether plaintiffs have shown a probability of success on the merits. (*Equilon Enterprises v. Consumer Cause*, *Inc.* (2002) 29 Cal.4th 53, 67; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

IV. DISCUSSION

A. Is The Second Amended Complaint Subject to Section 425.16?

Plaintiffs' second amended complaint is subject to the anti-SLAPP statute because the conduct of which plaintiffs complain falls squarely within the first two clauses of section 425.16, subdivision (e). Unlike clauses (e)(3) and (e)(4), the first two clauses of subdivision (e) do not require a showing by the moving defendant that the plaintiffs' cause of action arose from the defendants' statements involving a public issue. Plainly read, the language of section 425.16, subdivisions (e)(1) and (e)(2) protects "all statements or writings made before, or in connection with issues under consideration by, official bodies and proceedings." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119.) The Legislature has thus adopted a "bright-line 'official proceeding' " test for anti-SLAPP motions in clauses (1) and (2) of section 425.16, subdivision (e). (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1122.)

Dr. Everstine's written report to the family law court, her testimony at trial, and her communication to social service workers fall precisely within the definition supplied by subdivisions (e)(1) and (e)(2) of section 425.16. Plaintiffs nevertheless argue that if Dr. Everstine's conduct consisted of perjury, forgery, and alteration of medical records, as they allege, it cannot be deemed protected activity. That is, the acts cannot have been made in furtherance of any constitutional rights because there is no constitutional protection for this type of conduct.

The same argument has been made and rejected by numerous courts, including our Supreme Court. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94.) Under the anti-SLAPP scheme, in most cases the court need not consider whether the speech or petition at issue was a valid exercise of constitutional rights. "Rather, any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie

showing of the merits of the plaintiff's case.' " (*Ibid.*, quoting *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367.) Thus, "a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. [Citation.] Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089.) "In short, conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910-911.)

Here, plaintiffs' claims all flow from Dr. Everstine's appointment by the family law court as a custody evaluator. Her role as such was to advise the family law court by preparing a custody and visitation evaluation and testifying at the custody trial. To the extent the complaint includes Dr. Everstine's communications in connection with the dependency matter, that too was a judicial, or official, proceeding. Plaintiffs make no separate factual allegations relating to the entity defendants. Thus, all of the activity underlying plaintiffs' claims against defendants was either made in the context of a trial or was directly connected to the issues under consideration by a judicial tribunal and, therefore, qualifies for anti-SLAPP protection under section 425.16, subdivision (e)(1) or (e)(2).

B. Plaintiffs' Likelihood of Success on the Merits

Turning to the question of plaintiffs' likelihood of success, we conclude that plaintiffs have not demonstrated any legally sufficient claims.

The first six causes of action are barred by the litigation privilege of Civil Code section 47, subdivision (b)(2). With exceptions not relevant here, the litigation privilege applies to any publication or broadcast made in any judicial proceeding. The privilege

applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) [having] some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The privilege applies even if the communication took place outside the courtroom. (*Id*. at pp. 219-220.) And the privilege extends to all torts other than malicious prosecution. (*Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 169-170.)

Plaintiffs submitted evidence purporting to show that Dr. Everstine's evaluation was false, inaccurate, misleading, and unprofessional. None of this helps plaintiffs overcome the hurdle of the litigation privilege. *Gootee v. Lightner* (1990) 224 Cal.App.3d 587, 591-592 is precisely on point. Lightner was a psychologist appointed to evaluate the parents in an underlying custody dispute. Custody was at first awarded to the mother, apparently based upon Lightner's testimony. Soon afterward, custody was returned to the father. The father then sued Lightner for professional malpractice and other torts. (*Id.* at pp. 589-590.) Since the gravamen of the father's claim relied upon tortious conduct committed in connection with the testimonial function, the appellate court concluded that the absolute privilege barred the claims. (*Id.* at p. 596.) We reach the same result here.

The allegedly tortious conduct is Dr. Everstine's testimony, written report, and her oral communication with persons connected to the dependency proceeding. Although not solely testimonial, the conduct is indisputably communicative. Further, the communications were either made in the judicial proceedings themselves, were made in order to achieve the objects of the litigation, or were directly connected to the action. Thus, the privilege provides defendants with an absolute affirmative defense to each of the first six causes of action.

Kimmel v. Goland (1990) 51 Cal.3d 202, which plaintiffs cite in support of their argument that the conduct was noncommunicative, is distinguishable. That case involved

the taping of confidential telephone conversations. (*Id.* at p. 209.) The complaining party sought relief only for the taping, not for any broadcast or publication of information contained in the tapes. Specifically limiting its holding to the "narrow facts" of that case, the Supreme Court held that the illegal recording of telephone conversations is conduct, not communication, and was not protected by the litigation privilege. (*Id.* at p. 205.) In contrast, plaintiffs here seek relief for the communication. Plaintiffs cite as examples of noncommunicative conduct, Dr. Everstine's alleged nondisclosure of information and manipulation of testing data. But plaintiffs are not aggrieved by that conduct; their alleged injury is based upon the resulting communications. Plaintiffs also argue that Everstine engaged in "conduct" when she violated plaintiffs' privacy in various ways. Assuming the truth of this factual allegation, it is immaterial here because the operative complaint does not include a claim relating to that allegation.

Citing Civil Code section 47, subdivision (a) (privilege applies to the proper discharge of an official duty), plaintiffs contend that Dr. Everstine's conduct is not privileged because she was not *properly* discharging her duty. We need not consider the argument because we have found subdivision (b)(2) of that section to be the applicable privilege.

Plaintiffs' argument may also be read to mean that if the communications were willfully false and misleading, then the litigation privilege does not apply. But this is not the law. Our Supreme Court has always favored remedying litigation-related misconduct by sanctions imposed within the underlying lawsuit. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8.) "[T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation . . . . [¶] For our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings. To allow a litigant to attack the integrity of evidence after the proceedings have concluded, except in the most narrowly

circumscribed situations, such as extrinsic fraud, would impermissibly burden, if not inundate, our justice system." (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 214.) This is one policy that underlies the litigation privilege of Civil Code section 47, subdivision (b). It follows that even if Everstine's communications were false, plaintiffs' claims, as alleged in the first six causes of action, are barred. (See *Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 464.)

This brings us to plaintiffs' seventh cause of action for malicious prosecution. For obvious reasons, the litigation privilege does not apply to malicious prosecution actions. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 375.) Nevertheless, plaintiffs cannot prevail on this claim because there is no evidence that defendants instigated any prosecution against them. The alleged prosecution here is the dependency action instituted after Dr. Everstine testified at the custody trial. Setting aside the fact that dependency proceedings are not brought to punish parents (*In re La Shonda B.* (1979) 95 Cal.App.3d 593, 599), and the fact that mandatory child abuse reporters have absolute immunity from civil liability for reports of child abuse (Pen. Code, § 11172, subd. (a)), after reviewing the record with great care, we are unable to identify any evidence to show that defendants initiated the dependency proceedings.

Plaintiffs have not made any separate argument pertaining to the RICO claim contained in the eighth cause of action and, therefore, we deem that claim abandoned.

In sum, plaintiffs have not shown that any of their eight causes of action have any likelihood of success if they were to be tried.

C. The Trial Court's Failure to Strike Confidential Documents Attached to Defendant's Moving Papers

Prior to the hearing on defendants' anti-SLAPP motion, plaintiffs filed a motion to strike defendants' moving papers because, they claimed, defendants had attached allegedly confidential material, i.e., a copy of the offending custody and visitation evaluation. Plaintiffs now claim that since section 436 allows a court to strike any

"irrelevant, false, or improper matter," the trial court here abused its discretion in refusing to strike defendants' entire motion. Plaintiffs provide no authority or analysis in support of this contention. If an issue is not supported by pertinent or cognizable legal argument it may be deemed abandoned and there is no need for the reviewing court to discuss it. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) Accordingly, we need not consider this issue any further.

D. The Motion for Reconsideration

Plaintiffs finally argue that the trial court erred in refusing to hear the reconsideration motion on the merits. Plaintiffs make no argument other than that the trial court had "an imperative duty to allow the motion to be heard on its merits." Their only discussion of the factual basis for this assertion is that "plaintiffs presented over 20 new and/or different facts" in the motion.

Although the parties do not address the issue, a threshold question is whether the order denying plaintiffs' motion for reconsideration is appealable. This court has previously held that an order denying a motion for reconsideration of an appealable order is appealable when the motion raises new facts. (*Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 710.) Other cases have held that a motion for reconsideration is never appealable. (See e.g., *Crotty v. Trader* (1996) 50 Cal.App.4th 765, 770-771.) Assuming we were to maintain the position we held in *Santee*, plaintiffs' appeal of the reconsideration order would still fail because their motion was not based on new or different facts or law. (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 80-81.)

The court's interpretation of section 1008, subdivision (a) requires that when a party is seeking reconsideration of an order based upon new or different facts or law, the party must show that the facts or law were such that he or she could not, with reasonable diligence, have discovered and produced the material earlier. (*Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013 disapproved of an

another ground in *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1605-1608.) Plaintiffs' reconsideration motion contains no such facts or law. We have compared the facts and the law submitted in connection with the reconsideration motion to plaintiffs' complaint and to their opposition to the anti-SLAPP motion, and we conclude that everything they submitted in urging reconsideration either duplicated material plaintiffs had already submitted or existed at the time they filed their opposition to the anti-SLAPP motion. To the extent that some of the material is different from that submitted earlier, plaintiffs' only excuse for the tardy offer was that their attorney had not been diligent. But as we have explained, lack of diligence is not an acceptable basis for reconsideration. As plaintiffs did not introduce any new or different facts, circumstances, or law that they could not, in the exercise of reasonable diligence, have introduced earlier, they may not appeal the court's refusal to reconsider the motion.

Although the parties did not brief the appealability issue, we do not deem it necessary to permit additional briefing pursuant to Government Code section 68081, since our resolution of the issue necessarily resolves the substantive question of whether the motion warranted the trial court's reconsideration and plaintiffs have had ample opportunity to address that issue.

V. DISPOSITION

The trial court's order granting the motion of defendants Diana Everstine, Ph.D., Behavior Data, Inc., and Affiliated Psychologists & Counselors, Inc. to strike the second amended complaint is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.